

HARCHARAN SINGH SAUDAGAR SINGH

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v.

HASSAN ARIFFIN

HIGH COURT MALAYA, IPOH
ABDUL MALEK AHMAD J
[CIVIL SUIT NO. 25-552-86]
8 MAY 1990

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TORT: *Negligence - Defendant cutting into plaintiff's path - Duty of plaintiff to mitigate loss by looking for part-time work - Plaintiff discharging himself from General Hospital to go to a private hospital - Quantum of damages for personal injuries - Pain and suffering and loss of amenities - Loss of future earnings - Whether statutory multiplier should run from date of accident or date of judgment.*

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The plaintiff was driving his motor-cycle along his correct side of the road when the defendant, who was travelling in the opposite direction, suddenly cut across his path and collided into him. As a result the plaintiff suffered serious injuries. He was immediately rushed to the Teluk Intan District Hospital and then taken by ambulance to the Ipoh General Hospital where he was told that his leg might have to be amputated, whereupon his family immediately transferred him to a private hospital.

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Held:

[1] Based on the plaintiff's evidence, the investigating officer's testimony and in the absence of any evidence from the defendant (who never appeared at any of the hearings), the Court found the defendant 100% liable.

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[2] With regard to the plaintiff's loss of earnings, he should have mitigated his loss by looking for sideline part-time work although he was not in a position to do a similar job like the one he lost.

[3] As for medical expenses, since the plaintiff had transferred himself from the General Hospital to a private hospital on his own accord, the award must be reduced and only two-thirds of the amount claimed be allowed.

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[4] With regard to loss of future earnings, the statutory multiplier of 16 should run from the date of the accident and not from the date of judgment; since the pre-trial period had used up 4 years, the multiplier should only be 12.

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Legislation referred to:

Civil Law Act 1956, ss. 28A(2)(d)(i), (2)(c)

For the plaintiff - Darshan Singh Gill; M/s. Darshan Singh & Co.

For the defendant - C.K. Leong; M/s. C.K. Leong & Co.

JUDGMENT

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Abdul Malek Ahmad J:

The accident between the plaintiff, who was riding motor-cycle No. ABD 9092, and the defendant, who was driving motor-car AAM 3129, had taken place in front of the Shell petrol kiosk along Jalan Cangkat Jong, Teluk Intan, Perak on 15 March 1986 at about 8 p.m.

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- a* According to the plaintiff (PW2), he was driving his motor-cycle along his side of the road from Teluk Intan to Cangkat Jong when in front of the petrol kiosk, the defendant, who was from the opposite direction, had without stopping cut across his path to go into the petrol kiosk and collided into his motor-cycle. As a result, the plaintiff suffered deformity of the right thigh, tenderness of the left wrist, swelling of the right shin with tenderness, abrasions over both knees and the right shin, and fractures of the right femur, right tibia and fibula and left radius. He had been sent immediately to the Teluk Intan District Hospital, then taken by ambulance to the General Hospital Ipoh where the doctor told him that his leg may have to be removed whereupon his family immediately transferred him to the Fatimah Hospital Ipoh.

- c* The investigating officer (PW3) gave evidence that the damage to the motor-car were to the left front bumper which was bent, to the rearside headlamp which was dented, to the rearside front signal light which was broken and to the front grill and number plate which were cracked. He added that the damage to the motor-cycle were namely that the right side at the centre and the front fork were bent and the front number plate and the headlamp rim cover broken. The photographs tendered amply show the said damage to both vehicles and the motor-car in the position of about to enter the petrol kiosk.

- d* The defendant never appeared at any of the hearings and learned Counsel for the defendant informed the Court that he could not be traced. With respect, I found this excuse a little hard to swallow as the defendant was actually a serving police inspector. His police report as included in the bundle had, however, stated that he had stopped at the centre of the road before turning right into the petrol kiosk when the plaintiff's motor-cycle had knocked into his car while trying to avoid a bicycle in the motor-cycle's direction. His police report indicated that the collision took place while his car was stationary in the middle of the road. This of course is not supported by the sketch plan, the photographs and the damage to the motor-car. On the other hand, if the allegation was that the plaintiff's motor-cycle had in avoiding the bicycle knocked into him while his motor-car was about to enter the petrol kiosk, this also cannot be accepted as the damage to the motor-cycle would be at the front and not on the right hand side. The improbability of both the situations which can be inferred from the defendant's police report only serves to strengthen the plaintiff's version particularly in the absence of the defendant himself giving evidence and any other evidence to support the existence of a bicycle at the material time.

- g* Consequently, in view of the plaintiff's and the investigating officer's testimony supported by the sketch plan, the photographs and the damage to both vehicles, and in the absence of any evidence from the defendant and with the learned Counsel for the defendant agreeing to the defendant's negligence although subject to the question of contributory negligence on the part of the plaintiff, I could come to no other conclusion but to find the defendant 100% liable.

- h* I shall now deal with the quantum. Although the plaintiff had pleaded for RM70 for damage to clothings, he had given evidence that it was only RM40 to RM50 and taking notice that there must have been some damage in view of the accident and with learned Counsel for the defendant leaving the matter to the Court, I awarded RM50 for this item. For travelling expenses for the plaintiff's family and for the plaintiff's follow-up treatment, the plaintiff had testified that his family from Teluk Intan had visited him every day for the twelve days he was hospitalised costing RM40 by taxi as the family house was quite far from the bus station making it more convenient to come by taxi. The plaintiff also told the Court that his follow-up treatment was over a period of six months but did not state the number of visits. Learned
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Counsel for the plaintiff in his submissions had asked for RM480 for the family's trips and RM360 for the follow-up trips but since only RM400 was prayed for, and this was also the amount agreed to by learned Counsel for the plaintiff, I made an award only for the amount of RM400 pleaded. **a**

As for the loss of earnings, the plaintiff's testimony that he was earning RM1,500 a month as a field marketing officer at HYK Sdn. Bhd. at the time of the accident with petrol expenses paid by the employers and a motor-cycle provided by them had been corroborated by his brother (PW1), who was also a director of the said company, and the letter from the said company as to this fact (P1). In the absence of any evidence to the contrary, I accepted the plaintiff's claim of RM1,500 per month as being his salary. **b**

For the first six months after the accident, it is not disputed that he was being paid half his salary and I accordingly awarded him RM750 x 6 amounting to RM4,500. As the evidence clearly showed that the plaintiff found some difficulty in getting employment after that, even with his former employers, I made an award of RM1,500 for the next six months amounting to RM9,000. For the remaining thirty-six months of the pretrial period, I was of the view that by that time, which was a year after the accident, he should have actually got himself another job, and deducted RM500 from the RM1,500 to make an award of RM36,000. In fact, the plaintiff admitted that he was now employed in his father's video rental shop at a salary of RM250 per month but my view was that the pay should be higher and, in any case, the plaintiff should have mitigated damages by looking for sideline part-time work as well although he was not in a position to do a similar job like the one he lost. The total for this item therefore came to RM49,500. **c**

For medical expenses, I awarded the plaintiff RM6,711.10 in view of the receipts produced and the evidence of the Fatimah Hospital, Ipoh accounts clerk (PW4). The specialist's report charges had been agreed to between the parties at RM350 and RM120 and I made this award. The specialist's report had also categorically stated that future operations to remove the nailing and plating from the right femur at RM2,500 and to remove the plating from the right tibia at RM4,000 may be necessary but I awarded only two-thirds of this amount in view of the decision in *Tang Kia Bak v. Mooi Kim Ming & Anor.* (Supreme Court Civil Appeal No. 249 of 1987) which held that where a plaintiff transfers himself from the general hospital to a private hospital on his own accord, he should only be entitled to one-third of the amount claimed. Further, these operations are yet to be undergone. The awards made were RM1,650 and RM2,650 respectively but I had obviously made an error in calculations here as I had awarded two-thirds instead of one-third. The actual awards should have therefore been RM850 respectively. As the charges from the RIMV, medical and police reports had also been earlier agreed to between the parties at RM142, I awarded the plaintiff that amount for that item. **d**

For pain and suffering and loss of amenities, the plaintiff has stated that his left leg was shortened and it swelled and pained a lot in cold weather. He also could not squat, run or play games. Learned Counsel for the plaintiff had asked for RM20,000 for the femur fracture, RM8,000 for the tibia fracture, RM10,000 for the patella fracture, RM7,000 for the radius fracture, RM8,500 for the scars and RM2,500 for osteoarthritis quoting relevant authorities. Learned Counsel for the defendant had argued that this would mean a total of RM56,000 which was more than the normal award of RM45,000 for amputation of a leg which was the advice given by the General Hospital doctor and refused by the plaintiff. He accordingly submitted that the awards should be RM10,000, RM4,000 to RM5,000, RM4,000 and RM3,000 to RM4,000 for the respective fractures but no award should be made for the scars and osteoarthritis. In consequence, based on awards for similar injuries, I made an award of **e**

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- a* RM16,000 for the femur fracture, RM6,000 for the tibia fracture, RM7,000 for the patella fracture, RM4,000 for the radius fracture and RM2,000 for the scars. With overlapping, the Court made an award of RM31,500.

- b* For loss of future earnings, learned Counsel for the plaintiff had argued that the statutory multiplier of 16 brought about by the amendments to the Civil Law Act 1956 should run from the date of the judgment and not from the date of the accident. My view was different simply because as s. 28A(2)(d)(i) of the Act states that “in the case of a person who was of the age of thirty years or below at **the time when he was injured**...(the Emphasis is mine)”, it clearly meant that the calculation should commence from the date of the accident and not from the date of the judgment. Since four years had been taken up by the pretrial period, I held that the multiplier for loss of future earnings should only be 12.

- c* Section 28A(2)(c) of the Act had also enumerated what the Court should take into account for awarding damages for loss of future earnings firstly that the plaintiff was in good health but for the injury and was receiving earnings by his own labour or other gainful activity before he was injured, which had been proved in this case, and secondly that the Court should not take into account any prospect of the earnings being increased at some time in the future. However, I was of the considered opinion that although he had suffered partial loss of earnings as a result of the accident and had awarded RM1,000 per month for the pretrial period, the plaintiff was in a position to increase his reduced earnings, as opposed to his actual earnings as envisaged by the relevant paragraph, and awarded RM750 per month on a direct multiplier of 12 totalling RM108,000. I saw no reason to reduce the amount of earnings in respect of living expenses, which was the third consideration enumerated in that paragraph and which was suggested by learned Counsel for the defendant, as these had neither been proved nor admitted in evidence.

- e* Interest as usual was awarded at 8% on general damages from the date of service of writ to the date of judgment, except for future losses, and at 4% on special damages from the date of accident to the date judgment. Costs were accordingly ordered to be taxed.

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Also found at [1990] 2 CLJ 393

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